ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Case No.: 98-5410

WILLIAM D. ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

REPLY TO RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the extraordinary delay in carrying out the death sentence in this case violates the prohibition on Cruel and Unusual Punishments in the Eighth Amendment to the United States Constitution?

2. Whether the Florida Supreme Court's conclusory holding that the trial court's affirmative reliance on false information is harmless error violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution?

3. Whether Florida's felony murder aggravating circumstance genuinely narrows the class of persons eligible for the death penalty as required by the Fifth, Eighth, and Fourteenth amendments to the United States Constitution?

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STATEMENT OF THE CASE

In his original petition Mr. Elledge outlined the facts relevant to the three issues raised in this case. Respondent never disagrees with any of the facts in the original petition. However, Respondent includes a lengthy "Statement of the Case and Facts" in its petition. Petitioner would point out that much of this is irrelevant to any issue involved in this case.

REASONS FOR GRANTING THE WRIT

I. THE EXTRAORDINARY DELAY IN CARRYING OUT THE DEATH SENTENCE IN THIS CASE VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Respondent never quarrels with the fact that this is an important national issue that should be resolved by this Honorable Court. It never quarrels with the fact that the lower federal courts have used procedural bars to avoid reaching the merits of the issue and thus have not served as the laboratory to study this issue that Justice Stevens had hoped for in Lackey v. Texas, 514 U.S. 1045 (1995). It also does not dispute the fact that Mr. Elledge has been under death sentence since March, 1975. It does not dispute that this issue is properly preserved and that the Florida Supreme Court ruled on the merits. It does not dispute the fact that all of the delays were the result of his successful litigation concerning the violations of his rights under state law and/or the United States Constitution. Respondent's only claim concerning this issue seems to be that there is no "meaningful evidence" that spending twenty three years on death row is psychologically devastating. However, Mr. Elledge cited numerous opinions, books and articles documenting this phenomenon. Petition at 16-21. Respondent improperly asserts that Mr. Elledge is asking for release from incarceration in this point. Response at 16, n.1. However, the remedy he is seeking in this point is a life sentence.

This is a major national issue which should be resolved by this Honorable Court. This case is an excellent vehicle. The issue is

clearly preserved and Mr. Elledge has been under death sentence since March, 1975 due to his successful attacks on his sentence.

II. THE FLORIDA SUPREME COURT'S CONCLUSORY STATEMENT THAT THE TRIAL COURT'S AFFIRMATIVE RELIANCE ON FALSE INFORMATION IS HARMLESS ERROR VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent seems to rely virtually exclusively on Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004 (1994) for its response on this point. Romano is clearly distinguishable. In Romano, there was irrelevant, but accurate, evidence admitted before the jury. There was no indication that the jury relied on the evidence. Here, we know the judge relied on the evidence as he affirmatively placed it in his order. The information was false, not merely irrelevant. The error here is akin to that in Johnson v. Mississippi, 486 U.S. 578 (1988) which involved the use of false information. The Florida Supreme Court's application of harmless error in this case is similar to that previously held constitutionally deficient in Parker v. Dugger, 498 U.S. 308 (1991) and Sochor v. Florida, 504 U.S. 527 (1992). Here, there is no principled way to find beyond a reasonable doubt that the error was harmless.

III. FLORIDA'S FELONY MURDER AGGRAVATING CIRCUMSTANCE DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AS REQUIRED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent does not contest the fact that the decision of the Florida Supreme Court conflicts with the decisions of the three other state supreme courts on this important issue of federal constitutional

law. Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991). State v. Middlebrooks, 840 S.W.2d 317, 341-7 (Tenn. 1992), certiorari granted as Tennessee v. Middlebrooks, 507 U.S. 1028, certiorari dismissed as improvidently granted as Tennessee v. Middlebrooks, 510 U.S. 124 (1993). State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). Respondent's reliance on Jurek v. Texas, 428 U.S. 262 (1976) and Lowenfield v. Phelps, 484 U.S. 231 (1988) is misplaced. The Texas and Louisiana schemes at issue in Lowenfield and Jurek are significantly different than the Florida statute. Texas has a very limited capital murder statute which requires proof of one of five aggravating factors in addition to a "knowing and intentional murder". 428 U.S. at 264-274. In Lowenfield the narrowing function was performed at the guilt phase.

> Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person."

484 U.S. at 246.

By contrast, Florida has a broad first degree murder statute which includes both premeditated murder and felony murder. Florida's felony murder aggravating circumstance does not genuinely distinguish between those who deserve the death penalty from those who do not. Florida's sentencing scheme permits one to be sentenced to death based upon the felony-murder aggravating circumstance which is co-extensive with the felony-murder finding that underlays the first degree murder

conviction itself. Thus, the Florida scheme arbitrarily takes one of the two broad classes of murderers and automatically makes it subject to death without requiring any additional elements to justify imposing the death penalty. In Florida the proof of the fact that the killing occurred during the course of a felony substitutes for proof of premeditation. There is no rational basis for treating felony murderers as a class more harshly than the class of premeditated murderers by making the former but not the latter automatically subject to the death penalty. Such an arbitrary result is prohibited by the Eighth Amendment.

"Punishment should be directly related to the personal culpability of the criminal defendant." Penry v. Lynaugh, 492 U.S. 302 (1989). Thus, one will not be eligible for the death penalty absent proof of additional criteria which make him more culpable or otherwise deserving a more severe sentence. Lowenfield, 484 U.S. at 244. Because there is no genuine narrowing at the definitional stage, and because there are no rational criteria establishing greater culpability established by the felony-murder aggravating circumstance at the sentencing stage, Florida's felony-murder sentencing scheme does not rationally justify enhancing punishment for all felony murderers over all premeditated murderers. Florida's sentencing scheme violates the Eighth Amendment.

This Court should grant certiorari on this important constitutional issue in which the state supreme courts are split. It should

reverse the decision of the Florida Supreme Court and follow the decisions of the Tennessee, North Carolina, and Wyoming supreme courts.

CONCLUSION

The Court should grant the Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 by Federal Express this 22nd day of September, 1998.

Richard B. Greene
Of Counsel